UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES

TRINITY TRANSITION ASSOCIATES L.P. t/a ANGELA JANE PAVILION

Employer

and

Case 4-RC-21437

NATIONAL UNION OF HOSPITAL AND HEALTHCARE EMPLOYEES, DISTRICT 1199C, AFL-CIO,

Petitioner Union

Jeffrey L. Braff, Esq. of Philadelphia, PA for the Employer. Lawrence Geren, Esq., of Philadelphia, PA for the Petitioner. Donna Brown, Esq. of Philadelphia, PA for the Regional Director.

RECOMMENDED DECISION ON OBJECTION

Robert A. Giannasi, Administrative Law Judge. On August 5, 2008, I conducted a one-day hearing on the Employer's objection to a Board-conducted election, pursuant to a July 21, 2008 notice of hearing issued by the Regional Director for Region 4.

The election in this case took place on July 11, 2008, pursuant to a stipulated election agreement. Because the petitioned-for unit included both professional and non-professional employees, the parties stipulated to a *Sonotone*¹ self-determination election in which professional employees in Unit A² would vote on whether they wished to be included in a single unit with non-professional employees in Unit B,³ and, in a separate question, whether they

¹ Sonotone Corp., 90 NLRB 1236 (1950).

² Unit "A" included all full-time and regular part-time professional employees, including Registered Nurses (RNs), Licensed Practical Nurses (LPNs), Speech Language Pathologists (SLPs), Occupational Therapists, Physical Therapists, Certified Occupational Therapy Assistants (COTAs), and certified Physical Therapy Assistants (CPTAs) employed by the Employer at its 8410 Roosevelt Boulevard, Philadelphia, PA facility.

³ Unit "B" included all full-time and regular part-time non-professional employees, including clerks, cooks, maintenance employees, laundry employees, Certified Nurses Aides (CNAs), housekeeping employees, transport employees, dietary employees, activity aides, and receptionists employed by the Employer at its 8410 Roosevelt Boulevard, Philadelphia, PA facility.

wished to be represented by Petitioner for the purposes of collective bargaining.⁴

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The election was held as scheduled. In the separate election for professional employees in Unit A, the tally of ballots showed that 9 out of 16 voters chose to be included in the overall unit. Because a majority voted for inclusion, those ballots were combined with those of the non-professional employees in Unit B. The combined tally for Units A and B showed a vote of 38 to 17 for the Union, with 8 challenged ballots, which were deemed non-determinative.

On June 18, the Employer filed timely objections to the election results. Thereafter, the Employer withdrew all of its objections except one, whether the Board "erred in giving effect to a Stipulated Election Agreement that contravenes the provisions and purpose of the Act and well-settled Board policies." The basis of the objection is that Licensed Practical Nurses (LPNs) and Certified Physical Therapy Assistants (CPTAs), who were permitted to vote in Unit A, were, in fact non-professional employees, and their votes were sufficient to be outcome determinative.

After the close of the hearing, the Employer and the Petitioner Union filed briefs, which I have read and considered. Based on the testimony at the hearing, the entire record herein, and the positions of the parties, as reflected both at the hearing and in their briefs, I make the following findings and conclusions:

I. The Unit A Election Was Invalid

It is uncontested that 7 LPNs and 1 CPTA were among the 16 employees who voted in the Unit A election. If those employees were non-professional employees, they were ineligible to vote with professionals on the question whether professionals should be included in a unit with non-professionals. Section 9(b)(1) of the Act provides that the Board shall not "decide that any unit is appropriate . . . if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit." Thus, professional employees have the right to determine by majority vote whether they want to be included in a unit with non-professional employees. See *Sonotone Corp.*, 90 NLRB 1236 (1950).

Section 2(12) of the Act defines "professional" employees as

(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or (b) any employee, who (i) has completed the courses of specialized intellectual instruction

⁴ The stipulation stated that that if a majority of the voters in Unit A chose to be included with non-professional employees, their votes would be counted together with the votes of employees in Unit B to decide the question concerning representation for the overall unit consisting of the employees in Units A and B. If the majority of the employees voting in Unit A chose not to be included with non-professional employees, their ballots were to be counted separately to determine whether they wanted to be represented in a separate Unit A.

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and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

The Board has recognized that LPNs are not professional employees. *Marian Manor For The Aged*, 333 NLRB 1084, 1095 fn.60 (2001); *Presbyterian Medical Center*, 218 NLRB 1266, 1267 (1975). Undisputed testimony in this hearing also showed that the LPNs who were eligible to vote in the Unit A election did not have the unique training, education or duties set forth above to warrant treating them as professionals, contrary to established Board law. This is confirmed by reference to the Commonwealth of Pennsylvania's "Practical Nurse Law," 63 P.S. Sections 651-667.

Likewise, the undisputed testimony showed that the single CPTA who voted in the Unit A election did not have the type of education, training and duties to warrant treating her as a professional employee. That view is supported by reference to the Commonwealth of Pennsylvania's "Physical Therapy Practice Act," 63 P.S. Sections 1301-1313. Indeed, the Pennsylvania Code, 49 P.A. Code Section 40.171 distinguishes between physical therapists and their assistants (like the CPTAs here), both in terms of required training and permissible activities.⁵

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The Petitioner has not rebutted the testimony showing that the LPNs and the CPTA are non-professional employees. And it has not contested the applicable Pennsylvania law referenced by the Employer. Nor has it cited any cases or any other authorities to show that the Board considers them professional employees. I therefore find that the 7 LPNs and the single PTA who voted in the Unit A election were in fact non-professional employees ineligible to vote in that election. Their votes thus affected the election results in Unit A and made the results invalid.

The Petitioner's only contention on this part of the case is that the Employer stipulated to the inclusion of the LPNs and the PTA in Unit A, and the Regional Director approved the stipulation. Thus, according to the Petitioner, the stipulation should stand. But the stipulation provided that the LPN and CPTA positions were to be included among the professional employees who were to vote in the Unit A election. That was wrong as a matter of law because only non-professional employees are entitled to vote in a *Sonotone* election. Indeed, the representative of the Regional Director stated at the hearing that the Regional Director's approval of the stipulation in these circumstances was a mistake. Thus, the 8 non-professional employees were erroneously permitted to vote in the *Sonotone* election and contributed to the result that the professional employees agreed to be included in an overall mixed unit. Contrary to the Petitioner's contention, the Board has specifically held that a stipulation dealing with the inclusion or exclusion of professional employees in a mixed unit cannot override the requirements of Section 9(b)(1) of the Act that professional employees have a right to choose whether to be included in such a mixed unit. *Pontiac Osteopathic Hospital*, 327 NLRB 1172, 1173 (1999), citing *Valley View Hospital*, 252 NLRB 1146 (1980).

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In support of its contention that the stipulation should nevertheless take precedence, the Petitioner cites and relies upon *Hollywood Medical Center*, 275 NLRB 307 (1985). That case involved, as does this case, a stipulated *Sonotone* election, in which professional employees chose to be included in a non-professional unit. The employer objected to the inclusion, in the *Sonotone* election, of employees in 5 disputed job classifications, who allegedly were non-

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⁵ The references to Pennsylvania law were attached as exhibits to the Employer's brief.

professional employees. The Board overruled the objection and upheld the stipulation because the stipulation was not contrary to Board policy or violative of Section 9(b)(1). The Board noted that nothing in the five disputed classifications set forth in the stipulation indicated that they were non-professionals and there was no evidence that the employees in those classifications were non-professional employees or performed duties different than those implied in their job classifications. 275 NLRB at 308 fn. 3.

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But the present case is distinguishable from *Hollywood Medical Center*. Here, unlike in *Hollywood Medical Center*, the disputed job classifications were, on their face, non-professional; and there was no evidence that the employees in those job classifications were professionals and performed the duties of professional employees. Indeed, this case is more like *Valley View Hospital*, cited above, which the Board distinguished in *Hollywood Medical Center*.

In *Valley View Hospital*, the election stipulation included registered nurses in a unit with non-professional employees, without affording the registered nurses a separate vote on their inclusion in the unit. As registered nurses are professional employees, the Board held that the unit was, on its face, contrary to Section 9(b)(1). 252 NLRB at 1146. This was the very grounds the Board used to distinguish *Valley View Hospital* in *Hollywood Medical Center*. 275 NLRB at 308.

Here, the stipulation included, on its face, non-professional employees in the Unit A election. But they were not statutorily permitted to participate. Thus, in accordance with settled authority, their inclusion in the Unit A election violated Section 9(b)(1) of the Act.⁶

The election in Unit A was thus invalid and the Employer's objection to the election must therefore be sustained. It follows that a new election must be held in Unit A, in which only professional employees vote on whether they wish to be included in a unit with non-professional employees and, if they do not, whether they wish to be represented in a separate unit of only professional employees.

II. Issues Relating To Election in Unit B

The Notice of Hearing in this case authorized me to "take testimony to resolve the substantial and material factual issues raised by the Employer's Objection." The Objection stated that the Board "erred in giving effect to a Stipulated Election Agreement that contravenes the provisions and purposes of the Act and well-settled Board policies." In these circumstances, my authority appears to be limited to ruling on the objection. Nonetheless, at the hearing, I asked the parties to address the question whether, if the election in Unit A were found invalid, a new election in Unit B should also be required. As indicated, the election in the combined unit—including all 16 votes from Unit A—resulted in an overwhelming vote of 38 to 17 in favor of union representation, with 8 challenged ballots. That issue is, I believe, for the Regional Director to decide, but, below, I summarize the positions of the parties and offer my views for whatever guidance they may provide.

⁶ The two other cases cited by Petitioner are inapposite. Both *Premier Living Center*, 331 NLRB 123 (2000) and *Highlands Regional Medical Center*, 327 NLRB 1049 (1999) involved the alleged supervisory status of certain job classifications and the stipulations in those cases did not violate Board or statutory policy.

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The Union contends that even if a new election is required in Unit A, no new election is required in Unit B. I am not sure I agree with the Union's suggestion that a hearing would be required to rule on the 8 challenged ballots because they would be outcome determinative should the Unit A election results be overturned. See U. Br. p. 9, n. 2. Since it has been established that only eight of the voters in Unit A were truly professional employees, their votes in the combined unit would not have affected the results of the Unit B election. The eight non-professional employees who voted in Unit A were eligible to vote in Unit B and their votes were properly counted in the election for that unit. Those circumstances tend to support the notion that no new election need be held in Unit B.

The Employer's position is simpler and needs no mathematical computations. According to the Employer, both elections should be rerun because the results of the election in Unit B necessarily were affected by the impropriety of the election in Unit A. In support of its contention, the Employer cites *Sunrise*, *A Community for the Retarded, Inc.*, 282 NLRB 252 (1986). In *Sunrise*, no *Sonotone* election was held, and the stipulated unit description included registered nurses and excluded professional employees. Ruling on challenged ballots, the hearing officer ruled that the registered nurses who voted in the election were professional employees and thus the stipulation violated Section 9(b)(1). Nevertheless, the hearing officer noted that, even if the ballots of the professional employees were voided, the union would have received a majority of the valid votes cast. He therefore upheld the election and recommended that a certification issue in a unit modified to exclude the registered nurses. The Board reversed, stating that the defect could not be remedied "simply by modifying the unit." The Board held that the election must be set aside because it was conducted in an inappropriate unit.

Sunrise can be distinguished from the situation in this case. Here, the unit description in Unit B specifically includes non-professional employees. It does not, as did the stipulation in Sunrise, include job descriptions that do not belong in the unit. Thus, Unit B is an appropriate unit, unlike the unit found inappropriate in Sunrise.

As I have indicated, the issues relating to the validity of the election in Unit B are for the Regional Director to decide once the results of the new election in Unit A are tallied. At that point, the Regional Director can determine whether the results of the election in Unit B should stand or whether a new election should be conducted in that unit.

Conclusion

Because the election in Unit A was invalid as a result of its inclusion of non-professional employees, the Employer's objection is sustained. The election must be set aside and a new

election must be held in Unit A. The case is remanded to the Regional Director for Region 4 to hold the new election and to continue to process the matter as she deems appropriate.⁷

Dated at Washington, D.C., September 5, 2008.

To Robert A. Giannasi Administrative Law Judge

Pursuant to Section 102.69 of the Board's Rules and Regulations, any party may, within fourteen (14) days from the date of this recommended decision, file with the Board in Washington, D.C., an original and eight (8) copies of exceptions thereto. Immediately upon the filing of such exceptions, the party filing them shall serve a copy on the other parties and shall file a copy with the Regional Director for Region 4. If no timely exceptions are filed, the Board will adopt the recommendations set forth herein.